

ENG THYE PLANTATIONS BHD

a

v.

LIM HENG HOCK & ORS

COURT OF APPEAL, KUALA LUMPUR

b

GOPAL SRI RAM JCA

DENIS ONG JCA

MOHD NOOR AHMAD JCA

[CIVIL APPEAL NO: A-04-13-1998]

2 JULY 2001

c

CIVIL PROCEDURE: Appeal - Facts, finding of - Interference by appellate court - Whether sessions judge erred - Whether High Court correct in reversing sessions judge - Whether High Court making or merely reviewing findings of fact

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TORT: Negligence - Duty of care - Whether defendant owed duty of care to plaintiffs - Whether negligence established - Discharging effluent into river

This was the defendant's appeal against the decision of the High Court reversing the decision of the Sessions Court given in favour of the defendant. The defendant contended that the High Court was wrong to have interfered with the findings of fact made by the Sessions Court.

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Held:**Per Gopal Sri Ram JCA**

[1] The High Court judge did not make any findings of primary fact, but had merely drawn inferences from evidence that had been obviously overlooked by the Sessions Court. To completely overlook relevant evidence was a serious misdirection which warranted appellate interference.

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[2] The defendant, which used the environment in the ordinary course of its business, owed a duty of care to the other users of the same environment. The damage that the plaintiffs suffered was caused by the defendant and was clearly within its reasonable foreseeability. The defendant was therefore clearly guilty of the tort of negligence.

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[Appeal dismissed.]

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a [Bahasa Malaysia Translation of Headnotes]

b Ini adalah rayuan defendan terhadap keputusan Mahkamah Tinggi untuk memansuhkan keputusan yang memihak kepada defendan yang dibuat oleh Mahkamah Sesyen. Defendan mendakwa bahawa Mahkamah Tinggi telah membuat kesilapan kerana bercampur tangan dalam keputusan berdasarkan fakta yang dibuat oleh Mahkamah Sesyen.

Diputuskan:**Oleh Gopal Sri Ram HMR**

- c* [1] Hakim Mahkamah Tinggi tidak membuat sebarang keputusan berdasarkan fakta primer, tetapi hanya membuat kesimpulan daripada keterangan yang tidak diendahkan oleh Mahkamah Sesyen. Ketidakendahan terhadap keterangan penting adalah penyalaharahan berat yang mewajarkan percampuran tangan oleh mahkamah rayuan.
- d* [2] Pihak defendan, yang menggunakan alam persekitaran dalam kebiasaan perniagaanya, mempunyai kewajipan berjaga-jaga terhadap pengguna-pengguna lain alam persekitaran. Kerugian yang telah ditanggung oleh pihak plaintif diakibatkan oleh pihak defendan dan jelas boleh diramalkan dengan munasabah oleh pihak defendan. Pihak defendan ternyata bersalah atas tuduhan kecuai tort.
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*[Rayuan ditolak.]***Case(s) referred to:**

- f* *Clarke v. Edinburgh Tramways* [1919] SC 35 (*refd*)
Caparo Industries plc v. Dickman [1990] 2 AC 605 (*refd*)
Donoghue v. Stevenson [1932] AC 562 (*foll*)
Henderson v. Merrett Syndicates Ltd [1995] 2 AC 145 (*refd*)
Jaswant Singh v. Central Electricity Board [1967] 1 MLJ 272 (*refd*)
Sivalingam v. Periasamy [1996] 4 CLJ 545 (*foll*)
- g* *For the appellant - Dinesh Bhaskaran (Augustine Anthony); M/s Awtar Ghazali Augustine & Co*
For the respondents - M Thayalan; M/s Thayalan & Assoc
Reported by Suresh Nathan

JUDGMENT*h***Gopal Sri Ram JCA:**

- i* This case has to do with environmental law. The Sessions Court found for the defendant. The High Court reversed. This accordingly falls within that class of case in which we scrutinise the decision of the intermediate appellate judge with greater care. For it is only in rare cases that an appellate court should interfere with the primary findings of fact made by the trial court.

The primary facts in the present case are beyond dispute. The plaintiffs breed fish at the mouth of a river called Sungai Kuala Gula. They have been doing this since 1988. From time to time, when the fish are large enough, they are harvested from the river and sold. The plaintiffs therefore rely on the river to sustain their livelihood. The defendant owns an oil palm plantation and operates a palm oil processing factory. The defendant's operations are carried on at a site up-river. These operations have been going on since 1967.

On 24 January 1990, the plaintiffs noticed effluent flowing into the area in which they were rearing fish. It came from up-river. They described it as "black water". The effect of it upon the fish was startling. They started leaping out of the water. Eventually they all died. The plaintiffs were concerned. One of them (PW3) got into a boat and traced the effluent to its source. He found it flowing out of a tidal gate on the defendant's property. He then went onto the defendant's premises and saw effluent being discharged from the defendant's waste disposal area. Later, an investigation of the incident was conducted by the Fisheries Department. It came to the conclusion that the river water in the area in question was grossly polluted. Some two years after the incident, the plaintiffs filed their action in the Sessions Court. After a trial that lasted several days, the Sessions Court gave judgment for the defendant. The plaintiffs successfully appealed. The defendant now asks us to reverse the High Court and to restore the verdict of the Sessions Court.

The main ground for the High Court's intervention was that the trial judge had failed to properly evaluate the evidence. The defendant has criticised the High Court's judgment. In essence there is only one complaint. It is suggested that the High Court was wrong to have interfered with the findings of fact made by the Sessions Court. Counsel for the defendant relies on the pronouncements made in several leading cases on the point. I find it unnecessary to go through all of them here. Suffice that I refer to the rather well-known passage in the speech of Lord Dunfermline in *Clarke v. Edinburgh Tramways* [1919] SC (HL) 35 at p 36: which encapsulates the principle in remarkably succinct language. I have quoted it often enough. Here it is once again:

When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case, things are much more evenly divided;

- a* witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those
- b* circumstances is for each judge of it to put to himself, as I now do in this case, the question: am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot
- c* be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

But like all principles of law there are qualifications to this one as well. It would be an abdication of an appellate court's proper responsibility if it did not intervene and set right decisions of trial courts that are plainly wrong or unjust. I do not think that an exhaustive list of cases in which an appellate

d court may intervene can be set out. What is to be discerned is the principles upon which an appellate court acts. These are to be found in the joint judgment of my learned brother Shankar JCA and myself in *Sivalingam v. Periasamy* [1996] 4 CLJ 545. That was also a case of a failure on the part of the trial judge to undertake a judicial appreciation of the evidence. This is what we

e there said (at p. 550):

- f* It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

Returning to the present instance, counsel for the defendant makes two points. First, he says that the learned intermediate appellate judge purported to make

g his own findings of fact instead of accepting those made by the Sessions Court. Second, he argues that the learned intermediate appellate judge disregarded the fact that the eyewitness evidence led by the plaintiffs was contradicted by independent documentary evidence. I will address each of these complaints.

- h* Taking the first, it is quite true that there are several passages in the learned appellate judge's judgment in which he says he finds certain facts. When I first read the judgment this caused me some concern. For the function of making primary findings of fact is confined exclusively to a trial court. Appellate courts do not make findings of fact. They merely review the findings of primary fact made by a trial court. They may, however, draw their own
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inferences from the primary facts and if these differ from those drawn by the trial court, they are entitled to see what accounts for the difference. If it is an entirely subjective consideration, such as the impression made by a particular witness over whom the appellate court has had no audio-visual advantage, then it is only proper that the appellate court defer to the views of the trial judge.

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However, a closer examination of the judgment of the High Court reveals that the judge when he said he was making certain findings, he was merely drawing inferences from evidence that had been obviously overlooked by the Sessions Court. I am satisfied that he was not making any findings of primary fact. In this, the learned intermediate appellate judge was entirely correct.

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A reading of the Sessions Court's judgment reveals at least two serious infirmities. There is no judicial appreciation of the Fisheries Department's specific findings. Instead, the Sessions Court allowed its mind to be clouded by the several theories (none of which were established as a fact) advanced by the defendant about the alternative causes of the destruction of the plaintiffs' fish. If indeed, it was the plaintiffs' own mismanagement of the river water or the fish they reared in it that was the real cause of the harm complained of, it is reasonable that this would have surfaced during the two years or so prior to the incident in question. The plaintiffs depended on the river for their livelihood. It was entirely in their interests that the river be kept free of pollution. Any interference with the ecology of the environment would spell disaster for their livelihood. So it is a most unreasonable inference that the plaintiffs were the authors of their own harm. Yet this was put forward as part of the defendant's case and it obviously impressed the Sessions Court which found the plaintiffs' case unproved.

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The Sessions Court also failed to take any or any sufficient account of the uncontradicted evidence of one of the plaintiffs, PW6, who gave evidence as to the source of the effluent that had flowed into the river. Defendant counsel's argument was that this was the evidence of an interested witness and was therefore suspect. With respect, there is no rule of evidential assessment that requires the outright rejection of the evidence of an interested witness. An interested witness is entitled to have his evidence assessed as any other witness. No one can fault a trial judge for approaching the evidence of an interested witness with caution. But no more is required of a trial judge. He is entitled to act upon the evidence of an interested witness. To completely overlook relevant evidence is a serious misdirection. It warrants appellate interference.

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I now take the defendant's second complaint. It has to do with the conflict between PW4's evidence and the photographs taken at the scene. According to the plaintiffs' witnesses, it was "black water" that came flowing into the

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- a* river mouth. But the photographs do not show any black water. What they do show is water that is brownish in colour. The Sessions Court appears to have been much impressed by this rather insignificant fact. The defendant does not deny that it discharged effluent into the river. All it says is that the effluent was not harmful to the ecology of the environment and would have no adverse effect on the plaintiffs' fish. But events proved otherwise. It is not in doubt that PW3 and PW6 traced the origin of what they described as "black water" to the defendant's factory. So the point really turns on the plaintiffs' description of the effluent. I can hardly see that it matters. Why would the plaintiffs who took the photographs and produced them at the trial tell an obviously blatant lie about the colour of the water? It was certainly not to their purpose. What it then really boils down to is a question of description in the particular dialect. What does one call effluent in the Chinese language? In my view, "black water" is as good a description as any other simile. Nothing therefore turns upon the so-called contradiction.
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- c*
- d* Now the law as to environmental protection is not in doubt. So far as it is dependent on common law, the relevant principles that deal with the protection of the environment are to be found in the law of nuisance and in the tort of negligence. The plaintiffs in the present instance chose to found their action in negligence. In order to succeed they had to establish that the defendant owed them a duty of care, that the duty was breached and that the breach occasioned harm that was not remote.
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The defendant has not argued against the imposition of a duty of care. Applying the speeches in the House of Lords in *Caparo Industries plc v. Dickman* [1990] 2 AC 605 and *Henderson v. Merrett Syndicates Ltd.* [1995]

- f* 2 AC 145 I find this case to fall plumb within the Atkinian formula in *Donoghue v. Stevenson* [1932] AC 562. It is a case in which a duty of care was owed by the defendant to the plaintiffs. In my judgment people who use the environment in the ordinary course of their business owe a duty of care to other users of the same environment. There are many examples where a duty of care has been imposed upon an environment user. *Jaswant Singh v. Central Electricity Board* [1967] 1 MLJ 272 is one such. That case concerned damage to a plaintiff's animals by reason of the first defendants' failure to remove a telephone wire that had come loose and was resting on the first defendant's electric wires. The first defendant used the environment to construct pylons that carried electricity over land. Gill J, said at p. 275:
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In applying to the facts of the present case the principles of the law of negligence which I have discussed, the first question which I have to consider is whether in view of what happened the defendants can be said to have created a situation of peril, however blamelessly, which generated a consequential duty to adopt precautions before it culminated in injury. In other words, were the

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circumstances in which damage was caused to the plaintiff capable of giving rise to a notional duty of care? It is clear from the evidence that the telephone wire by itself was not a dangerous thing. What made it dangerous was the fact that it was resting on top of an electric wire by reason of which it was capable of becoming live with electricity, thereby causing damage to anyone who came in contact with it. It was the omission on the part of the defendants to remove the telephone wire from the top of the electric wire which created the situation of danger and consequently gave rise to a notional duty of care. The defendants have not sought to deny the existence of such notional duty. In any event, I do not think it can be seriously argued that no reasonable person could foresee some damage arising to someone in all the circumstances of the case.

Here, the defendant was clearly the plaintiffs' neighbour both in terms of physical proximity and consequence of action. The plaintiffs are persons whom the defendant ought to have had in its contemplation when it discharged the effluent in question. It must be taken to have known of the harm that its activity would cause to the plaintiffs' livelihood. It did not act as a reasonable person would have acted in the circumstances. The damage that the plaintiffs suffered was caused by the defendant and was clearly within its reasonable foreseeability. The defendant was therefore clearly guilty of the tort of negligence. The Sessions Court was obviously wrong in holding for the defendant. The High Court was obviously correct in reversing the trial judge. I am therefore of the view that this appeal should fail.

The appeal is accordingly dismissed. All orders made by the High Court are affirmed. There was an obvious error by the High Court on the question of interest on damages. General damages were claimed. The normal rule is that interest on such damages should run from the date of commencement of proceedings at the rate of 8% per annum. The award by the High Court was accordingly varied and interest was awarded to the plaintiffs at the rate of 8% from the date of the summons in the Sessions Court.

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